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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHRISTINE RUSSELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals applied an incorrect standard in determining that the government was not "substantially justified," within the meaning of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in litigating this case.

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v.

CHRISTINE RUSSELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 814 F.2d 148. The opinion of the district court denying an award of attorney's fees (App., *infra*, 17a-26a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 28a) was entered on March 20, 1987. On June 8, 1987, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Equal Access to Justice Act, 28 U.S.C. 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. Congress enacted the Equal Access to Justice Act of 1980 (EAJA), 28 U.S.C. 2412, "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. The Act does not mandate automatic fee-shifting. Instead, it provides that a court is to award fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2)(B)) that prevails in a nontort civil action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

2. This attorney fee dispute arose out of a case in which respondent challenged the decision of the petitioner to deny waiver of recoupment of overpaid Social Security benefits under Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), which provides that such recoupment

may be waived where the recipient was without fault and certain other requirements are met. Petitioner had determined that respondent should have known that her institutionalized son was not "in her care" for purposes of entitlement to mother's insurance benefits, and thus she was "not without fault" in failing to report this fact to the Social Security Administration. App., *infra*, 2a-3a.[1] The district court found that petitioner's determination that respondent was culpable in receiving the payment was not supported by substantial evidence. The district court, however, denied respondent's fee petition under the EAJA, finding that while petitioner had failed to prevail, his position was substantially justified under the Act. *Id.* at 20a-25a.

The Third Circuit reversed, holding that petitioner's position was not substantially justified. Relying heavily on the legislative history of the 1985 enactment of EAJA, the court ruled that the test for substantial justification under EAJA is more than mere reasonableness: because there was a lack of substantial evidence supporting the Secretary's position on the merits, and because "there are no 'extraordinary special circumstances' here, it follows that the Secretary's position was not 'substantially justified' as Congress intended that concept to be applied." App., *infra*, 13a (citation omitted).[2]

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[1] After respondent's spouse died, she applied for Social Security survivor benefits on behalf of herself and her two children. The younger son was confined in a state mental institution, and thus concededly not in her care. Although the application forms respondent signed clearly explained that her entitlement to benefits depended on her having an entitled child in her care, and warned her of her obligation to report to the Social Security Administration when she no longer had such a child in her care, respondent failed to notify the Administration when her elder son reached 18 and lost his entitlement. She thus received $8,338.50 in benefits to which she was not entitled. App., *infra*, 4a-7a.

[2] The court also required "the government, in relying entirely upon a legal argument, * * * [to] demonstrate that that argument presented

REASONS FOR GRANTING THE PETITION

This case, like *Pierce* v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987), and *Dubose* v. *Pierce*, petition for cert. pending, No. 86-516, raises the question of the meaning of the term "substantially justified" in EAJA, 28 U.S.C. 2412(d). As we explained in our brief in *Underwood*,[3] the courts of appeals are not currently in agreement on the proper definition of that term. Because EAJA litigation would be greatly simplified by the formulation of clear rules to test the reasonableness of the government's position, we have, in our *Underwood* petition and in the brief, invited this Court to formulate such rules. In order to do so, this Court will, in all likelihood, consider the legislative history on which the court below relied. If the Court agrees with our contention in *Underwood* that the test remains one of reasonableness, then the government should not have been held liable for EAJA attorney fees in this case; it would accordingly be appropriate for the court of appeals to reconsider its holding here in light of this Court's opinion in *Underwood*.

When Congress originally enacted Section 204 of EAJA in 1980,[4] it made the government liable for attorney fees incurred by persons who successfully oppose government action—but only when the government's position was not "substantially justified." That standard was chosen as a "middle ground" (H.R. Rep. 96-1418, 96th Cong., 2d Sess. 14 (1980)) that "balances the constitutional obliga-

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an unsettled or close question of law." App., *infra*, 11a (quoting *Lee* v. *Johnson*, 799 F.2d 31, 38 (3d Cir. 1986)). Finding no such question present, the court rejected the Secretary's argument that respondent could be charged with knowledge of the regulations (App., *infra*, 14a).

[3] We are serving a copy of our *Underwood* brief on respondents.

[4] Sections 201-208 of Pub. L. No. 96-481, 94 Stat. 2325-2330, constitute the original EAJA. Section 204, 94 Stat. 2327, amended 28 U.S.C. 2412. Accordingly, we refer hereafter simply to Section 2412.

tion of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights" (*id.* at 10). See S. Rep. 96-253, 96th Cong., 1st Sess. (1979); 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini).

Because EAJA is designed to encourage challenges only to "unreasonable governmental action" (Pub. L. No. 94-481, § 202(a), 94 Stat. 2325), it follows logically—as Congress in enacting the 1980 Act repeatedly explained—that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 22 (1980). See S. Rep. 96-253, *supra*, at 6; H.R. Rep. 96-1418, *supra*, at 10, 13, 14. Congress emphasized that subsection (d) of Section 2412 "should not be read to raise the presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra*, at 7; H.R. Rep. 96-1418, *supra*, at 11. See 125 Cong. Rec. 21444-21445 (1979) (remarks of Sen. Kennedy). Instead, the government must show only that its arguments were plausible, and that an informed judgment would have viewed those arguments as having some substance and some possibility of success.

Subsection (d) of Section 2412 of the original EAJA expired by its terms on October 1, 1984. Pub. L. No. 94-481, § 204(c), 94 Stat. 2329. Congress subsequently reenacted that subsection as of August 5, 1985. Pub. L. No. 99-80, § 2(a), 99 Stat. 184. While the reenactment left unchanged the statutory language authorizing an award of fees in the absence of substantial justification, the accompanying House Report stated that the test for substantial justification "must be more than mere reasonablness." H.R. Rep. 99-120, 99th Cong., 1st Sess. 9 (1985). Despite this state-

ment, we think it clear that the 1985 reenactment, which did not alter the text of Subsection (d) in any relevant way, should not be read to modify the "reasonableness" test for substantial justification that had been applied by 11 courts of appeals (including the court below) prior to 1985. See *United States* v. *Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985) (citing cases).[5] As then-Judge Scalia noted, the House Report did nothing more than "comment[] upon language drafted in an earlier Congress, and reenacted, *unamended* as far as is relevant to the present point, in the 1985 law." *Hirschey* v. *FERC*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring) (emphasis in original). Such a report cannot be given dispositive weight. See generally *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 822-824 (1980). Indeed, there are special reasons to be skeptical about the House Report: sponsors of the EAJA reenactment in both Houses took the extraordinary step of renouncing portions of the report on the floor. See 131 Cong. Rec. S9993 (daily ed. July 24, 1985 (remarks of Sen. Grassley); 131 Cong. Rec. 16917 (1985) (remarks of Rep. Kindness); *ibid.* (remarks of Rep. Moorhead). Cf. *id.* at 16917-16918 (remarks of Rep. Kastenmeier). See generally *Rose* v. *FEC*, 806 F.2d 1081, 1089-1090 (D.C. Cir. 1986). In these circumstances, it is clear that Congress did not mean to disturb the settled meaning of the law through "reenactment of the same language unchanged" (*Hirschey*, 777 F.2d at 8 (Scalia, J., concurring) (emphasis omitted)).

Several courts of appeals accordingly have held that the governing standard remains one of reasonableness, explaining that the 1985 legislative history is "conflicting and inconclusive." *Russell* v. *National Mediation Board*, 775

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[5] The only court that applied a semantically different test before 1985 was the District of Columbia Circuit, which required the government to demonstrate that its position was "slightly more" than reasonable. *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983), cert. denied, 466 U.S. 936 (1984).

F.2d 1284, 1288-1289 (5th Cir. 1985). See *Phil Smidt & Son, Inc.* v. *NLRB*, 810 F.2d 638, 642 n.5 (7th Cir. 1987); *Pullen* v. *Bowen*, 820 F.2d 105 (4th Cir. 1987).[6] Other courts have read the 1985 legislative history as changing the applicable standard. See *Lee* v. *Johnson*, 799 F.2d at 38 n.7; *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (en banc) (government must show "that [its position] was *clearly* reasonable") (emphasis in original); *Riddle* v. *Secretary of HHS*, 817 F.2d 1238, 1244 (1987) ("the government's position must have *more* than a reasonable basis") (emphasis in original), rehearing en banc granted (6th Cir. July 9, 1987).[7]

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[6] Several other courts have continued to apply the reasonableness standard without discussion of the 1985 legislative history. See *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986); *Fulton* v. *Heckler*, 784 F.2d 348, 349 (10th Cir. 1986); *United States* v. *Yoffe*, 775 F.2d at 449. Cf. *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1497, vacated in part on other grounds, 804 F.2d 1573 (11th Cir. 1986) (leaving it unclear whether the standard is one of "reasonableness" or "more than mere reasonableness"). And compare *Herring* v. *United States*, 781 F.2d 119, 121 (8th Cir. 1986) (reasonableness standard) with *United States* v. *1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986) ("clearly reasonable" standard); *Jackson* v. *Bowen*, 807 F.2d 127 (8th Cir. 1986) (same), and *Gamber* v. *Bowen*, No. 86-5435-SD (8th Cir. July 10, 1987), slip op. 4 (same).

[7] The District of Columbia Circuit has adhered to its prior view that the government's position must be "slightly more than reasonable" (*Battles Farm Co.* v. *Pierce*, 806 F.2d 1098, 1101-1102 n.11 (1986), petition for cert. pending, No. 86-1661), although it has expressed skepticism that there is any meaningful distinction between its standard and one of simple reasonableness (*ibid.*). As we pointed out in our opposition to the certiorari petition in *Battles Farm*, the court there held "only that if a private plaintiff * * * combines one adventurous, far-reaching losing claim with a more orthodox winning claim, and the two are intertwined, we must consider the justification of the government's *entire* litigating position before awarding attorney's fees" (806 F.2d at 1104 (emphasis in original)). That petition thus does not present the issue at stake here, in *Pierce* v. *Underwood*, *supra*, and in *Dubose* v. *Pierce*, *supra*.

Although we submit that any distinction between tests formulated in terms of degrees of reasonableness must be largely semantic, the test adopted by the court below appears to go further. Instead of considering whether the Secretary's position was reasonable—in any degree—it simply found it dispositive, in the absence of "extraordinary special circumstances," that the Secretary's decision on the merits was reversed for lack of substantial evidence (App., *infra*, 13a).[8] See also *Trahan* v. *Regan*, No. 86-5051 (D.C. Cir. July 28, 1987), slip op. 12 (EAJA fees available when agency decision contrary to law). This formulation avoids meaningful consideration of the statutory question that determines whether the government is liable for attorney fees—whether its position was substantially justified. The substantial justification standard, however articulated, should focus on whether the government's position was plausible, and whether the government's arguments could have been made with some hope of success.

In *Underwood*, this Court will consider whether the original understanding of the "substantial justification" standard promulgated in the 1980 EAJA retains its validity under the 1985 EAJA, contrary to the position of the court below. The Court's analysis in *Underwood* is likely to clarify the standard to be applied in situations like the one presented here.

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[8] This is equivalent to a per se rule, because Section 2412(d) in terms precludes the award of attorney fees in *any* case when "special circumstances make an award unjust."

CONCLUSION

This petition should be held pending this Court's decision in *Pierce* v. *Underwood*, No. 86-1512, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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AUGUST 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1281

RUSSELL, CHRISTINE, APPELLANT

v.

HECKLER, MARGARET

On Appeal From the United States District
Court for the Eastern District
of Pennsylvania

(Filed Mar. 20, 1987)

OPINION

BEFORE: SLOVITER and STAPLETON,
Circuit Judges and FARNAN, *District Judge**

STAPLETON, *Circuit Judge*:

Christine Russell appeals the district court's denial of her motion for an award of attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (Supp. III 1985). Russell seeks compensation for attorney's fees and costs incurred during judicial review of the decision by Secretary Heckler of the Department of Health and Human Services not to waive recoupment of social security benefit overpayments made to Russell. Russell also seeks compensation for attorney's fees and

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*Honorable Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

costs incurred in litigating this fee petition. The liability of the United States turns on whether the Secretary's positions on recoupment and this fee petition were "substantially justified" as that phrase is used in the EAJA.[1] 28 U.S.C. § 2412(d)(1)(A) (Supp. III 1985).

The Social Security Act states that overpayments are not to be recouped if the recipient is "without fault" and certain other requirements are met. 42 U.S.C. § 404(b) (1982). In the first instance, the administrative law judge (ALJ) found that Russell was "not without fault" and thus that recoupment of the overpayment could not be waived. App. at 14. The Appeals Council summarily affirmed the ALJ's decision, finding substantial evidence that Russell was at fault. The district court concluded that the Social Security Administration (SSA) could not recoup the overpayment because the ALJ's findings were not supported by substantial evidence that Russell was at fault. On the petition for attorney's fees, however, the district court determined that the position taken by the SSA, although rejected by the court, was "substantially justified," and therefore concluded that the United States was not liable for Russell's attorney's fees under the EAJA. 28 U.S.C. § 2412(d)(1)(A) (Supp. III 1985). We reverse, finding that Russell is entitled to an award of attorney's fees and costs with respect to both the recoupment proceedings and this fee petition.

I.

The Secretary's position in the recoupment proceeding was that Russell "should have known" her institutionalized son Michael was not "in her care," and therefore Russell was "not without fault" in failing to report her ineligibility

[1] The attorney's fee section of the Social Security Act, 42 U.S.C. § 406(b) (1982), is not applicable to fees incurred in resisting recoupment of overpayments of social security benefits.

to the SSA and in accepting the overpayments. In order to determine whether this position is substantially justified, and thereby evaluate Russell's claim for attorney's fees and costs, it is necessary to consider the law and facts relevant to the underlying recoupment proceedings.

A.

Section 204(b) of the Social Security Act provides:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

42 U.S.C. § 404(b) (1982). In order to show that the recipient was at fault under the SSA regulations, the facts must show that the overpayment resulted from:

> (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
>
> (b) Failure to furnish information which he knew or should have known to be material; or
>
> (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

20 C.F.R. § 404.507 (1986).[2]

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[2] The regulations also state that recoupment will defeat the purpose of the Social Security Act if it will "deprive a person of income required for ordinary and necessary living expenses." 20 C.F.R. § 404.508 (1986). The Secretary did not take a position before the district court on the issues of whether recoupment would defeat the purposes of the Act or would be consistent with equity and good conscience. Russell was overpaid $8,338.50. Her only cash income at the time of the hearing was $43 per week in state assistance.

B.

Appellant Christine Russell's husband, James Russell, died in July of 1974. The Russells were the parents of two surviving sons: James Gary, then 15, who lived with his mother; and Michael Russell, then 9, who was mentally retarded and lived in a nursing home under the custody of the State of Pennsylvania. Although Christine Russell did not pay for Michael's care, she was consulted about his welfare and activities.

After her husband's death, Christine Russell applied to the SSA for mother's insurance benefits, surviving child's insurance benefits and benefits on behalf of another—her institutionalized son Michael. To qualify for mother's insurance benefits, an applicant must have at least one child in her care. To be named as payee for a child's benefits, the child must be in the care of the applicant.

The SSA benefit application forms refer to the requirement that there be a child "in your care." For example, the application form for receipt of benefits on behalf of another states: "Do you agree to notify the Social Security Administration promptly when you no longer have responsibility for the welfare and care of any person for whom you receive payments?" App. at 76. The application for mother's insurance benefits states:

> You may receive a mother's benefit for any month in which you have in your care a child or dependent grandchild of the deceased entitled to a child's insurance benefit because he (she) is:
>
> —under age 18, or
>
> —disabled or handicapped (age 18 or over and disability began before age 22)

App. at 66. It also explains that:

> YOU MUST NOTIFY THE SOCIAL SECURITY ADMINISTRATION PROMPTLY IF:
>
> —You MARRY

> —You NO LONGER HAVE IN YOUR CARE a child or dependent grandchild of the deceased entitled to benefits because he (she) is under 18 or disabled.

App. at 68. None of the application forms, however, explains what "in your care" means in the context of an institutionalized child or in any other context.

The regulations defining "in your care" during the relevant period are set forth in the margin.[3] It is undisputed at this point that Michael was not in Russell's care within the meaning of these regulations in 1974 or thereafter.

When Russell visited the SSA office to apply for benefits, she explained to the interviewing SSA employee that Michael was living in a nursing home, that he had

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[3] Between 1974, when Russell applied for benefits, and 1981, when benefits were terminated, the regulatory definition of "in your care" was amended several times, but none of these changes were pertinent to whether Michael was in Russell's care. In 1974, the relevant regulations, 20 C.F.R. §§ 404.342, 404.343, 404.348, and 404.349 (1974), provided:

> **§ 404.342 in her care.**
>
> For purposes of §§ 404.313, 404.335, and of Subpart E, a mother (whether a wife, widow, or surving divorced mother) has a child in her care if she exercises parental control and responsibility for the welfare and care of a child under age 18, or of a child age 18 or older who is mentally incompetent. If the child is age 18 or older and mentally competent, "in her care" means that the mother is performing personal services for the child.
>
> **§ 404.343. In her care; exercising parental control and responsibility.**
>
> For purposes of § 404.342:
>
> * * * * *
>
> (b) Parental control and responsibility may be exercised directly or, where the mother and child are apart, it may be exercised indirectly. The fact that the mother has not lost the legal right to the child's care and custody, and retains the right to exercise parental control and responsibility, does not constitute the exercise of such parental control and responsibility even if she

furnishes the child's food, clothing, and shelter or makes provision therefor.

§ 404.348. In her care; mother and child not living together; separation expected to be indefinite or to exceed 6 months.

(a) *General.* Where the mother and child are not living together and the separation will be for an indefinite period, or is not expected to end within 6 months, the mother is exercising parental control and responsibility for the care and welfare of the child only under the conditions described in paragraphs (b), (c), (d), and (e) of this section. If the child resumes living with the mother before the end of 6 months, the provisions of § 404.347 are applicable in determining whether the mother has the child in her care.

* * * * *

(e) *Mother and child not living together; child mentally incompetent.* Where mother and child are not living together (regardless of reason), and the child is mentally incompetent, and the mother is exercising parental control and responsibility if she supervises the activities of the child, participates in the important decisions about the child's physical and mental needs, and measurably controls the child's upbringing and development.

§ 404.349 In her care; when a mother does not have a child in her care.

Notwithstanding the provisions in §§ 404.342-404.348, a mother does not have a child in her care, for purposes of this subpart or Subpart E, if:

(a) The child is in the armed forces; or

(b) The mother and child are not living together and either;

(1) The child is living with the father; or

(2) The mother is mentally incompetent; or

(3) The child was removed from the mother's custody and control by a court order; or

(4) The mother has relinquished her right to custody and control of the child to some other person or agency; or

(5) The separation is for a period of more than 6 months, and the child is age 18 or older and is mentally competent.

been a "ward of the state" since 1967, and that she was "allowed to bring him home for an occasional week" but that she saw him only rarely. App. at 74-76. She was told by the SSA employee that Michael was eligible for benefits and that she was eligible for mother's insurance. The employee filled out the necessary applications setting forth the above disclosures and Russell signed each of the forms without reading them. While Russell apparently understood that she was eligible to receive Michael's benefits only if he was in her care, there is no evidence that the "in your care" requirements was explained to her by the SSA employee who filled out the application and Russell remained unaware of the regulatory definition of that phrase. When Russell left the SSA Office, she believed that Michael was sufficiently in her care to be entitled to benefits. This impression was confirmed when she received benefits as the payee for Michael.

James turned 18 on July 6, 1977. Because Michael was not in her care, Christine Russell became ineligible for mother's insurance on that date and had an obligation to notify the SSA. Russell did not notify the SSA of this change in status because she believed that Michael was in her care. Russell received mother's insurance benefit checks between July 1977 and July 1981, when the SSA terminated her benefits, in the total amount of $8,338.50.[4]

The SSA sought recoupment of this $8,338.50 overpayment. Russell did not argue that she was entitled to these benefits, but argued instead that recoupment should be waived in her case because she was "without fault" in receiving the overpayments. Russell's application for a waiver was denied. Russell requested and received a hearing on the recoupment issue before an administrative law judge. The ALJ's factual findings focused primarily on

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[4] The Secretary sought recoupment of only mother's insurance benefit overpayments. *See* App. at 97-101.

the use to which Russell put the benefits paid to her on behalf of her son Michael. The ALJ also found, however, that by signing the application for receipt of benefits on behalf of another, Russell "indicated her understanding that she would be required to notify the Administration of any changes in her beneficiary status." App. at 13. On the basis of these factual findings, the ALJ concluded that Russell was "not without fault." The ALJ therefore decided that recoupment could not be waived.

Russell asked the Appeals Council to review the ALJ's decision. The Appeals Council "acknowledge[d] that it was by and large unnecessary for the Administrative Law Judge, in his decision, to discuss the use to which" Russell put the funds she has received. App. at 3. The Appeals Council denied the request for rehearing, however, because it found that there was substantial evidence that Russell was not without fault, relying specifically on the fact that Russell signed the three application forms. Thus, the ALJ's determination that Russell was not without fault stood as the final decision of the Secretary.

Russell sought judicial review of the Secretary's determination. In the district court, the Secretary argued that substantial evidence in the record supported the conclusion that Russell was not without fault. In particular, the Secretary asserted that the signed application forms stating that recipients are required to notify the SSA when they no longer have in their care a child under 18 or disabled were sufficient basis for finding that Russell "should have known" and reported that she was ineligible as of July 1977. The district court rejected this position and entered summary judgment for Russell. The district court later denied Russell's motion for attorney's fees under the EAJA, finding that the Secretary' position was "not unreasonable" and therefore was "substantially justified." Memorandum Opinion at 9, 11.

The district court had subject-matter jurisdiction over the underlying matter under 42 U.S.C. § 405(g) and over the request for fees under 28 U.S.C. § 2412. This court has appellate jurisdiction to review the final order of the district court denying attorney's fees under 28 U.S.C. § 1291.

II.

The initial question is whether the district court erred in denying Russell's motion for attorney's fees. Our review of the district court's determination that the Secretary's position was substantially justified is plenary. *Washington v. Heckler*, 756 F.2d 959, 963 (3d Cir. 1985).

A.

The Equal Access to Justice Act provides that:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (Supp. III 1985).[5] The Secretary argues that her position was "substantially justified."[6]

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[5] This section was repealed on October 1, 1984. The section was revived and made effective with respect to all litigation pending or initiated on or after August 5, 1985. Pub. L. No. 99-80 §§ 6, 7, 99 Stat. 183, 186 (1985). Russell's petition for review of the Secretary's determination was pending in the district court on that date.

[6] The Secretary does not argue that there were "special circumstances" in Russell's case that render an award unjust. *See Brinker v. Guiffrida*, 798 F.2d 661, 667-68 (3d Cir. 1986).

This court summarized the law regarding substantial justification in *Washington v. Heckler*, 756 F.2d 959, 961 (3d Cir. 1985) (citation omitted):

> Substantial justification "constitute[s] a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous." The burden of proving substantial justification is on the government. To meet its burden, the government must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounds; and (3) a reasonable connection between the facts alleged and the legal theory advanced. The government's burden of showing substantial justification is a strong one and is not met merely because the government adduces "some evidence" in support of its position.

After *Washington* was decided, Congress revived the EAJA, which was repealed in 1984, and in doing so clarified the meaning of "substantially justified." The House Report accompanying that legislation took the following positions which are highly relevant in the present context:

> Another problem which has developed in the implementation of the Act has been the fact that courts have been divided on the meaning of "substantial justification." Several courts have held correctly that "substantial justification" means more than merely reasonable. *Because in 1980 Congress rejected a standard of "reasonably justified" in favor of "substantially justified," the test must be more than mere reasonableness.*
>
> Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or

> was not supported by substantial evidence. *Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.*

H.R. Rep. No. 120, 99th Cong., 1st Sess. 9-10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138 (emphasis supplied; footnotes omitted). *See Stokes v. Bowen*, No. 86-1477 (3d Cir. Feb. 19, 1987).

In *Washington v. Heckler*, this court held that a legal position is substantially justified if it relates to an unsettled or close question of law, but not if it clearly offends established precedent. 756 F.2d at 961-62. This court recently found this test to be consistent with the Congressional direction not to apply a "mere reasonableness" test. *Lee v. Johnson*, 799 F.2d 31, 38 n.7 (3d Cir. 1986). "Therefore, for the government, in relying entirely upon a legal argument, to establish that its position was substantially justified, it must demonstrate that that argument presented an unsettled or close question of law." *Id.* at 38.

B.

The Secretary bears the burden of presenting a basis for her position in both fact and in law. Here, there is no dispute about the relevant primary facts. The record establishes that Russell signed but did not read the application forms. Nevertheless, she understood that she was eligible for benefits only if she had a child in her care. Russell did not know the regulatory definition of the "in your care" requirement as applied to her relationship with Michael, and it was not explained to her. The oral advice Russell received at the SSA office and the SSA's approval of Russell as Michael's representative payee led her to believe that he was indeed in her care.

The Secretary's legal position in the recoupment proceeding was succinctly stated in the following segment of her district court brief in the recoupment proceedings:

> The Secretary is justified in requiring that plaintiff have read the application and know the simple conditions under which she received benefits, *i.e.*, that she have a child of decedent under age 18 in her care. Additionally, the Secretary can require plaintiff to follow the clear instructions given on the application that plaintiff inform SSA when she no longer met those conditions. The Secretary believes, therefore, that she properly can impute to plaintiff knowledge of plaintiff's obligation after July 1977 to report the fact that she no longer had a child of decedent under age 18 in her care. The Secretary can also impute to plaintiff knowledge of her agreement to make such a report and return any benefit checks to which she was not entitled.

Brief in Support of Defendant's Motion for Summary Judgment at 6.

For present purposes we may assume, without deciding, that the Secretary was substantially justified in contending that the recipients of benefits should be held to know that which is disclosed in the benefit application. This does not aid the Secretary because even with this assumption, there is a lack of substantial evidence to support the Secretary's ultimate finding that Russell was at fault. The applications told her only that she would remain eligible only so long as she had a child in her care and that she had a duty to report when this was no longer the case. Moreover, this limited advice was not the only information tendered to Russell by the SSA in connection with her 1974 applications for benefits and cannot be evaluated in isolation. The oral advice that Russell received from SSA office representatives and the message that she received from the Agency's approval of the application in which she had

disclosed the relevant facts regarding Michael's situation were reasonably taken by Russell as an application of the "in your care" concept to the specific facts of her case. We reject the Secretary's implicit contention that Russell should have perceived an irreconcilable conflict between the Agency's apparent interpretation of its own requirements and the otherwise unexplained phrase "in your care."

Assuming that Russell was without fault in 1974 in understanding that Michael was in her care, as we find she clearly was, we fail to see how the Secretary can be substantially justified in maintaining that she was "at fault" on and after July 6, 1977 when the only change of circumstance on that date was that Russell reasonably understood she had only one child in her care rather than two. The Secretary's own regulations provide that a recipient failing to report an event because of reliance on statements of Social Security personnel is without fault. 20 C.F.R. § 404.510a (1977) ("Where an individual . . . accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration . . . with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto, . . . such individual, in accepting such overpayment, will be deemed to be 'without fault.' "). This is the substance of what occurred in this case and we, accordingly, conclude that the district court was correct in holding that the Secretary's position in the recoupment proceeding was unsupported by substantial evidence. Given that there are no "extraordinary special circumstances" here, it follows that the Secretary's position was not "substantially justified" as Congress intended that concept to be applied. H.R. Rep. No. 120, 99th Cong., 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138.

At times the Secretary seems to be making the additional legal argument that a recipient of benefits is charged with knowledge of the regulations. If this were a tenable proposition of law, the Secretay's contention that Russell was "at fault" would have been substantially justified. The Secretary cites no authority for this proposition, however, and, far from representing an "unsettled or close question of law," we believe it is clearly refuted by the statute and regulations themselves. As the court explained in *Cucuzzella v. Weinberger*, 395 F. Supp. 1288, 1295 (D. Del. 1975):

> The [statute and] regulations dealing with repayment presuppose that there will be situations in which improper payments are received and retained and the recipient is nevertheless not at fault. Accordingly, it is clear that recipients are not always to be deemed to have knowledge of the law or to be charged with negligence for failure to know it.

In *Kendrick v. Califano*, 460 F.Supp. 561, 571-72 (E.D. Va. 1978), the court, taking a similar view, held that the Secretary cannot arbitrarily assume that a claimant understood the application of the Social Security law to his particular situation. *See also Davidson v. Harris*, 502 F.Supp. 1208, 1214 (E.D. Pa. 1980) (a recipient cannot be deemed to know and understand regulations simply because she can read and write).

In short, Section 404(b) of the statute and its implementing regulations cannot be reconciled with the Secretary's apparent contention that recipients of benefits must be held to know the law. Accordingly, this contention was not substantially justified. Since, under any other view of the law, there was no substantial evidence to support a contention that Russell was at fault, we hold that the Secretary's position in the recoupment proceeding was not "substantially justified" within the meaning of the EAJA.

III.

When the United States opposes a fee petition under the EAJA and its opposition is not "substantially justified," the petitioner may recover the attorney's fees and costs incurred in litigating the fee petition. *Lee v. Johnson*, 799 F.2d at 39. Where the opposition of the government is not based solely on a contention that its position in the underlying proceeding was substantially justified, an application for fee petition expenses can present issues not resolved by the proceedings on the original fee petition. *See, e.g., Lee v. Johnson*, 799 F.2d at 39-40. Where the sole basis for the opposition is the alleged substantial justification of the government's position in the underlying proceedings, however, the petitioner will almost always, if not always, be entitled to fees for litigation over an EAJA fee petition if she is entitled to fees for the underlying litigation. Here the petitioner, having established her rights to relief on the original petition, has demonstrated an entitlement to an award of fee petition expenses since the Secretary's opposition to the fee petition was not "substantially justified."

With respect to the amount of the fee petition expense, we reach the same conclusion we have previously reached in the context of the attorney's fees section of the Social Security Act:

> We perceive no reason why the district court should not set the fees for work in both courts when representation in each was required. That practice reduces the time and effort required of counsel and also simplifies judicial oversight of the process.

Guido v. Schweiker, 775 F.2d 107, 110 (3d Cir. 1985).

IV.

The order of the district court denying an award of attorney's fees and costs under the EAJA will be reversed

and the case will be remanded so that the district court may make an award of fees and costs attributable to the recoupment proceedings in the district court and to the fee petition proceedings in the district court and this Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 85-627

CHRISTINE RUSSELL

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

Mar. 6, 1986

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J.

This action was brought by Christine Russell to obtain relief from an order of the Secretary of Health and Human Services denying waiver of recoupment of an overpayment of $8,338.50 in mother's insurance benefits. The court granted summary judgment in plaintiff's favor. Plaintiff has moved for attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d).

The plaintiff is clearly a prevailing party. A prevailing party other than the United States in an action brought by or against the United States is entitled to an award of attorney's fees "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). The law applicable to the determination of entitlement to EAJA attorney's fees was recently summarized by the Court of Appeals for the Third Circuit as follows:

> Substantial justification "constitute[s] a middle ground between an automatic award of fees to a prevailing party and an award made only when the

> government's position was frivolous." . . . The burden of proving substantial justification is on the government. . . . To meet its burden, the government must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounds; and (3) a reasonable connection between the facts alleged and the legal theory advanced. . . . The government's burden of showing substantial justification is a strong one and is not met merely because the government adduces "some evidence" in support of its position.

Washington v. Heckler, 756 F.2d 959, 961 (3d Cir. 1985) (citations omitted).

The plaintiff applied for and received mother's insurance benefits pursuant to section 202(g) of the Social Security Act, 42 U.S.C. § 402(g), following the death of her husband in 1974. She had two children, James and Michael, by her husband. James lived with his mother, but Michael who is severely retarded had been under institutionalized care since 1967 under the supervision of the Commonwealth of Pennsylvania. The plaintiff was eligible for mother's insurance benefits as long as at least one child by her insured, deceased husband remained in her care and was under age 18 or was disabled. In 1977, James turned 18 and the plaintiff was no longer eligible for mother's insurance benefits because she had no child by her deceased husband in her care who was under age 18 or disabled.[1] She received $8,338.50 in benefits to which she was not entitled between 1977 and 1981 when the Social Security Administration (SSA) discovered that she was not entitled to benefits as of James' eighteenth birthday. Mrs. Russell agrees that she received overpayments totaling

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[1] The amount of mother's insurance benefits depends upon the number of children receiving child's benefits, not the number of children in the mother's care. Eligibility for the mother's benefits, however, requires that at least one child be in the mother's care.

$8,338.50, but she claimed to be entitled to a waiver of recoupment because she was not at fault in the overpayment and recoupment would be contrary to the purposes of the Social Security Act.

Section 204(b) of the Social Security Act, 42 U.S.C. § 404(b), provides:

> (b) No recovery from persons without fault
>
> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Recoupment is deemed to defeat the purpose of the Social Security Act if it would "deprive a person of income required for ordinary and necessary living expenses." 20 C.F.R. § 404.508. Mrs. Russell has no substantial assets. She lives in public housing, and her costs of living are met by receipt of $86 every two weeks from the Pennsylvania Department of Public Welfare supplemented by food stamps. There is no question that recoupment would defeat the purpose of the Social Security Act, and the only issue that was substantialy disputed in this action was whether Mrs. Russell was without fault in connnection with her overpayments.

The Secretary's regulations define fault as follows:

> "Fault" as used in "without fault" . . . applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances,

> including his age, intelligence, education, and physical and mental condition. What constitutes fault . . . on the part of the overpaid individual . . . depends upon whether the facts show that the incorrect payment to the individual . . . resulted from:
>
> (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
>
> (b) Failure to furnish information which he knew or should have known to be material; or
>
> (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

20 C.F.R. § 404.507. The Administrative Law Judge (ALJ) found that Mrs. Russell was not without fault in causing the overpayment and the Secretary contended that the finding was supported by substantial evidence. Although I found that the decision of the ALJ was not supported by substantial evidence, I now find that the government's position was substantially justified, and that the plaintiff is not entitled to an award of attorney's fees.

In determining whether the government's position was substantially justified, the court should consider both the position taken by the government in the civil action and the agency action upon which the civil action is based. 28 U.S.C. § 2412(d)(2)(D); *Washington v. Heckler*, 756 F.2d at 961. The ALJ appeared to base his finding of fault primarily upon Mrs. Russell's statement in her 1974 application that she intended to use the benefits to care for Michael and her admission that most of the money received was used in her own household, and not for Michael's care. As the Appeal's Council noted, "it was by and large unnecessary for the Administrative Law Judge, in his decision, to discuss the uses to which [Mrs. Russell] put the overpayment in question." Transcript at 3. Fault for overpayments relates to responsibility for the overpayments being made to the recipient, not to the way the

overpayments are spent. *See* 20 C.F.R. § 404.507. Nevertheless, the Appeals Council denied Mrs. Russell's request for review, noting that the applications for benefits she signed in 1974 provided substantial evidence supporting the ALJ's finding of fault.[2]

The Secretary's position was more fully articulated in her arguments before this court. The application for mother's insurance benefits sets forth, in prominent type, the following notice:

> YOU MUST NOTIFY THE SOCIAL SECURITY ADMINISTRATION PROMPTLY IF:
>
> * You MARRY
> * You NO LONGER HAVE IN YOUR CARE a child or dependent grandchild of the deceased entitled to benefits because he (she) is under 18 or disabled.
>
> Benefits may end if either of the above events occurs. However, there are certain exceptions which are explained in the informational booklet which you will receive. You must report each of these events even if you believe an exception applies. We will advise you whether additional evidence is needed and how your benefits may be affected.

On Mrs. Russell's form a box is checked noting her agreement to notify the Social Security Administration promptly if either of those events occurred. Mrs. Russell testified that she did not adequately understand her obligations because she did not fill out the form herself, she merely signed it, and the SSA representative did not adequately describe to her the meaning of "in your care." Mrs. Russell

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[2] Technically, the ALJ found that Mrs. Russell was "not without fault." There is no significant difference between a finding that one had some fault and a finding that one was not without fault. The party seeking waiver of recoupment need not be solely responsible for the overpayment to have some fault. *See* 20 C.F.R. § 404.507.

did receive some pamphlets from the SSA when she filled out her application, but she never read those pamphlets.[3] Mrs. Russell did not inform the SSA, when James turned 18, that she no longer had in her care a child of the deceased who was entitled to benefits. Mrs. Russell apparently thought that Michael was in her care for the purpose of her receipt of mother's insurance benefits even though he was physically being cared for by the Commonwealth.

The Secretary contended that she was "justified in requiring that plaintiff have read the application and know [sic] the simple conditions under which she received benefits, *i.e.*, that she have a child of decedent under age 18 in her care." Brief in Support of Defendant's Motion for Summary Judgment at 6. The Secretary further contended that she was entitled to "require plaintiff to follow the clear instructions given on the application that plaintiff inform SSA when she no longer met those conditions." *Id.* Accordingly, the Secretary contended that she properly could "impute to plaintiff knowledge of plaintiff's obligation after July 1977 to report the fact that she no longer had a child of decedent under age 18 in her care." *Id.*[4]

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[3] No pamphlets were made part of the record of this action, and it is uncertain what information the pamphlets Mrs. Russell received contained.

[4] In addition to the record of agency action, the Secretary attempted to bolster her argument by a document Mrs. Russell signed on July 21, 1980, stating that she had one child in her care who was entitled to Social Security benefits. This exhibit, which is Attachment #1 to the Secretary's brief in support of her motion for summary judgment, was not part of the record considered by the ALJ or the Appeals Council and, therefore, cannot be taken into account in considering the substantial justification for the agency action, although it might have bearing on the substantial justification of the Secretary's position before this court. To the extent that this exhibit should be considered, it does not alter the determination on substantial justification. Mrs. Russell contends she did not understand that Michael was not in her

There is no real dispute concerning the facts of this action; the ALJ did not question Mrs. Russell's credibility, he merely concluded that, accepting her proffered lack of understanding, she still was at fault for not informing the SSA that she no longer had a child eligible for benefits in her care. Given this lack of disputed facts, the government has shown "a reasonable basis in truth for the facts alleged," and the court's attention must focus on whether the government has shown "a reasonable basis in law for the theory it propounds" and "a reasonable connection between the facts alleged and the legal theory advanced." *See Washington*, 756 F.2d at 961. Essentially, the court must determine whether there was a reasonable basis for the Secretary's position that she was entitled to find Mrs. Russell at fault because Mrs. Russell did not understand that Michael was not in her care and she did not have a sufficient understanding of the clear meaning of the eligibility and reporting requirements set forth on the application she signed.

There was no contention that Mrs. Russell knowingly concealed any relevant information from the SSA. The applications she filled out in 1974 stated that Michael was not living with her and that he was a ward of the state.

If the case turns upon an unsettled or disputable issue of law, the government's position may be substantially justified even though it is rejected by the court. *See Washington*, 756 F.2d at 961; *Dougherty v. Lehman*, 711 F.2d 555, 566 (3d Cir. 1983). "When the government's legal position clearly offends established precedent, however, its position cannot be said to be 'substantially justified.' " *Washington*, 756 F.2d at 962.

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care. Although the document she signed in 1980 defines "in your care" as having "parental control and responsibility for the welfare of a child," Mrs. Russell's confusion with respect to whether Michael was in her care was based on her understanding that the institution's consultation with her concerning Michael's care constituted continuing parental control and responsibility for the welfare of the child by her.

The plaintiff has cited to a number of district court opinions that suggest that it is improper for the Secretary to find fault for overpayments by imputing to the claimant knowledge of the application of the complex statutory and regulatory provisions of the Social Security system to his or her particular situation. *Davidson v. Harris,* 502 F. Supp. 1208, 1214 (E.D. Pa. 1980); *Kendrick v. Califano,* 460 F. Supp. 561, 571-72 (E.D. Va. 1978); *Cucuzzella v. Weinberger,* 395 F. Supp. 1288, 1295 (D. Del. 1975). Although the Secretary cites to no cases contrary to those cited by the plaintiff, I do not find that the Secretary's position clearly offends established precedent. In the present case, the Secretary attempted to impute knowledge concerning a basic requirement for eligibility. Moreover, it was not unreasonable for the Secretary to contend that a mother should understand that a son who is in the legal custody of the state and who is institutionalized at the expense of the state is not under her care. The ALJ took all the circumstances into account as he was required to do under the Secretary's regulations. Given the clear meaning of "in your care" in the English language, it was not unreasonable for the Secretary to contend that Mrs. Russell should have known that Michael was not in her care and that she was, therefore, at fault with respect to the overpayments.

Although Mrs. Russell did not actively and knowingly conceal information from the SSA, fault may be found upon "[f]ailure to furnish information which [the claimant] knew *or should have known* to be material." 20 C.F.R. § 404.507(b) (emphasis added), *see also id.* § 404.507(a) (fault based on incorrect statement that individual "knew or should have known to be incorrect"); *id.* § 404,507(c) (fault based on acceptance of payment individual "either knew or could have been expected to know was incorrect"). Clearly the Secretary is not required to show intentional fraud to establish fault. Given the cir-

cumstances of this case, she had a reasonable basis for contending that this was a situation in which the claimant should have known she was ineligible for payments.

In practical terms, one cannot help but question the reasonableness of an attempt by the government to recover $8,338.50 from a woman who has no substantial assets and whose only income is $86 every two weeks in welfare payments. This attempt is particularly troublesome in light of the SSA's investigation into misuse of the funds received which concluded in a determination that Mrs. Russell "ha[d] not misused the child's benefits." Transcript at 138. Nevertheless, the Social Security Act does not provide that the government will waive recovery solely on the basis that recovery would defeat the purposes of the Act, *i.e.*, deprive a person of income required for ordinary and necessary living expenses. Recovery of overpayment is only waived under the Act if the person overpaid is without fault *and* recovery would defeat the purpose of the Act or would be against equity and good conscience. 42 U.S.C. § 404(b); 20 C.F.R. § 404.506. The Secretary was required to refuse to waive recovery unless she found Mrs. Russell to be without fault.

For the reasons stated above, I find that, although the Secretary's decision was not supported by substantial evidence, her position was substantially justified. Plaintiff's motion for attorney's fees will be denied. In reaching this conclusion, I have attempted to follow what the Third Circuit "says" about the Equal Access to Justice Act. *Cf. Washington,* 756 F.2d at 968 (Aldisert, C.J., concurring). If the Equal Access to Justice Act is to fulfill the promise of its title, it is difficult to accept that this plaintiff should not be entitled to attorney's fees. Given her financial resources, it is doubtful that she can adequately pay her attorney by herself. Denial of attorney's fees in this action may well discourage attorneys from representing clients such as the plaintiff. Certainly the government should not

be precluded from vigorously enforcing the laws of the United States, but neither should it be permitted to overreach its authority simply because the individuals affected cannot afford meaningful access to the courts. Although I conclude that the government's position was "substantially justified" under the EAJA, I do so with reservations out of concern that the result reached will not bring about equal access to justice.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 85-627

CHRISTINE RUSSELL

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

Mar. 6, 1986

ORDER

Upon consideration of plaintiff's motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and supporting and opposing memoranda of law, for the reasons stated in the accompanying memorandum, it is

Ordered that plaintiff's motion for attorney's fees is denied.

BY THE COURT:

/s/ DONALD W. VANARTSDALEN
Donald W. VanArtsdalen

APPENDIX D

United States Court of Appeals
FOR THE THIRD CIRCUIT

NO. 86-1281

RUSSELL, CHRISTINE, APPELLANT

v.

HECKLER, MARGARET

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Mar. 20, 1987

JUDGMENT

Present: SLOVITER and STAPLETON, *Circuit Judges* and FARNAN, *District Judge**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 4, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 10, 1986, be, and the same is hereby reversed and the cause remanded to the said District Court so that it may make an award of fees and costs attributable to the recoupment proceedings in that court and to the fee petition proceedings in that court and in this Court. All of the above in accordance with the opinion of this Court.

*Honorable Joseph J. Farnan, Jr., United States District Judge for the District of Delaware, sitting by designation.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-251

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

VS.

CHRISTINE RUSSELL

BRIEF OF RESPONDENT CHRISTINE RUSSELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER - STATEMENT

Respondent takes issue with Petitioner's characterization in footnote 1 of p. 3 of his Petition for Writ of Certiorari that "...the application forms respondent signed clearly explained that her entitlement to benefits depended on her having an entitled child in her care, and warned her of her obligation to report to the Social Security Administration when she no longer had such a child in her care,..."

To the contrary the application forms contained the language "in your care" but did not explain the regulatory meaning of such phrase. Petition for Writ of Certiorari, 5a. Nor was there any evidence of record that the "in your care" requirements were explained to Mrs. Russell by any social security personnel. Thus, it cannot be said that the "in your care" concept was "clearly" explained in the applications.

SUMMARY OF THE ARGUMENT

The Third Circuit Court of Appeals did apply a test of reasonableness in determining that the position of the Secretary of Health and Human Services was not substantially justified. Though some of the Court's language shows support for a view that if the government's position was not supported by substantial evidence then it cannot be substantially justified, the Court did not adopt that as a per se rule. Rather, it analyzed the case in accordance with the reasonableness test and only afterwards concluded that this was a case where there was such a dearth of evidence to support the Secretary's legal theories that they were not substantially justified.

Furthermore, the legal theories themselves, when scrutinized under the reasonableness test, were found to "clearly offend established precedent." This too justifies the conclusion that the Secretary's position lacked substantial justification.

This approach was not condemned by the congressional criticism of the 1985 House Report cited by the Solicitor General. That criticism sought to prevent a lack of substantial evidence from inevitably leading to an award of counsel fees under the Equal Access to Justice Act. The Third Circuit opinion does not embrace such inevitability.

ARGUMENT

Though certain language in the decision of the Third Circuit seems to say that the Secretary's position was not substantially justified merely because it was not supported by substantial evidence, a scrutiny of the opinion reveals that the reasonableness test which the Solicitor General advocates was the underpinning of the outcome. It just happened that in this case not only was the Secretary's position not supported by substantial evidence, but it was not supported by any of the evidence. Thus, this exemplifies a situation where "reasonableness" as a test for "substantially justified" can be measured in terms of whether there was substantial evidence, or even any evidence, to support the government's position.

To argue that such a case cannot be within the "reasonableness" standard would contradict the views of the Solicitor General as presented in his Petition for a Writ of Certiorari (hereafter "petition"). Some of the congressional remarks referred to in his petition (petition, 6) which renounce portions of the House report accompanying the 1985 reenactment by no means proscribe what has occurred in this case. For example, Senator Grassly in the cited material said:

> ...that where the agency action is found by a Court to be arbitrary and capricious or where there is little or no factual support for the agency action, the government - as a practical matter - has its work cut out for it to prove substantial justification.

131 Cong. Rec. 59993 (daily ed. July 24, 1985 (remarks of Sen. Grassly). And, Rep. Kastenmeir stated:

> I do not understand the committee report to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees.

131 Cong. Rec. 16917 (1985) (remarks of Rep. Kastenmeir). This and the other congressional criticism cited focused on the implication in the House Report that agency action that was not supported by "substantial evidence" inevitably leads to finding the action not "substantially justified." Federal Election Com'n vs. Rose, 806 F.2d 1081, 1090 n.15 (D.C. Cir. 1986). This Third Circuit opinion does not embrace such implication.

Indeed, this decision of the Third Circuit is consistent with the Solicitor General's view that in order for the government to establish that it was substantially justified it "... must show only that an informed judgment would have viewed its arguments as having some substance and a fair possibility of success." Brief for Petitioner in Samuel R. Pierce, Jr. vs. Myrna Underwood, et al., Supreme Court of the U.S., October Term, 1987, No. 86-1512, p. 16. succinctly stated, it was found in this case that the Secretary's position had no substance. The Secretary's legal theories were found untenable and the Third Circuit wrote:

> Since, under any other view of the law, there was no substantial evidence to support a contention that Russell was at fault, we hold the Secretary's position in the recoupment proceeding was not "substantially justified" within the meaning of the EAJA. (emphasis added).

Petition, 142.

That the Court below analyzed the case in the context of the "reasonableness" test and did not, as the government contends, simply find it dispositive that the Secretary's decision on the merits was reversed for lack of substantial evidence, (Petition 8), is evident by the first sentence of the analytical portion of its opinion. That sentence reads "The Secretary bears the burden of presenting a basis for her position in both fact and in law." (Petition, 11a,B). The Third Circuit elaborates by writing that the government must show a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theory it propounds and a reasonable connection between the facts alleged and the legal theory advanced. (Petition, 10a). This expression of the test is not unlike that of other Circuit Courts approved by the government in such cases as Russell vs. National Mediation Board, 775 F.2d 1284, 1289 (5th Cir. 1985); Phil Smidt & Son, Inc. vs. N.L.R.B. 810 F.2d 638, 642 (7th Cir. 1987); and, Pullen vs. Bowen, 820 F.2d 105,108 (4th Cir. 1987).

Despite referring to the legislative history disapproved of by the Solicitor General, and writing that it clarifies the meaning of "substantially justified", the Third Circuit does not reject or denounce the aforementioned "reasonableness" test. Rather, it utilizes it to conclude that in this case the lack of any evidence to support the agency position makes it not substantially justified. It was already settled law that

> The government's burden of showing substantial justification is a strong one and is not met merely because the government adduces "some evidence" in support of its position.

Washington vs. Heckler, 756 F.2d 959, 961 (3rd Cir. 1985); Petition, 10a.

Therefore, rather than rely on the legislative history as a per se rule, the Third Circuit has re-examined the facts and the government's legal theories in accordance with the three-point analysis aforementioned. The Court below showed, point by point, how there was no resonable connection between the facts alleged and the legal theory advanced by the Secretary. It mentioned how the latter sought to support its theory that Christine Russell was at fault by considering only her written applications for benefits. However, the applications could not "be evaluated in isolation" in that such approach ignored the oral advice given by the Social Security representatives. It rejected the Secretary's baseless contention that Mrs. Russell should've perceived an irreconciliable conflict between

Social Security's interpretation of its own requirements as they applied to her "and the otherwise unexplained phrase 'in your care'." Also, it found the Secretary's position to be in direct contradiction of one of his own regulations - that a recipient failing to report an event because of reliance on statements of Social Security personnel is without fault. (Petition, 12a-13a).

Again, it just so happens that such analysis is consistent with there being a lack of substantial evidence to support the Secretary's position. Moreover, the Third Circuit's decision contains an original analysis in that there is no District Court opinion in support of its holding on the merits that the agency action was not supported by substantial evidence. The only District Court opinion is on the counsel fee petition.

Additional indicia of the lower Court's use of "reasonableness" exists in its review of the Secretary's legal argument that a recipient of benefits is charged with knowledge of the regulations. (Petition 14a). This argument was considered in the context of whether the government was able to show a reasonable basis in law for such theory. This theory was evaluated in accordance with the standard that "... a legal position is substantially justified if it relates to an unsettled or close question of law, but not if it clearly offends established precedent." (Petition, 10a).

This standard is found in Washington vs. Heckler, 756 F.2d 959, 961-62 (3d. Cir. 1985), which this writer believes is a

leading Third Circuit case on the application of the Equal Access to Justice Act. It is stated therein that:

> ...there is no per se rule that imposes counsel fees on the government when it loses merely because its legal theory is rejected. If, for example, the case turns on an unsettled or "close question of law", the government usually will be able to establish that its legal theory was 'reasonable', even if it was not ultimately accepted as a legal rule by the courts. When the government's legal position clearly offends established precedent, however, its position cannot be said to be "substantially justified".

This became an acceptable application of the "reasonableness" test in order to evaluate the government's legal theories. It was the test applied by the Third Circuit in the case sub judice.

CONCLUSION

This case is not comparable to Pierce vs. Underwood as the government contends. The Court of Appeals did apply a test of reasonableness in determining that the agency's position was not substantially justified. The Petition for a Writ of Certiorari should be denied.

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